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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 302. 33

J. W. HURLEY, APPELLANT,

vs.

THE COMMISSION OF FISHERIES OF VIRGINIA ET AL.

BRIEF FOR APPELLANT.

HERBERT I. LEWIS,
THOMAS J. DOWNING,
THOMAS B. SNEAD,
S. S. P. PATTESON,
Counsel for Appellant.

(27,614)

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Statement of the Case.

The facts in this case are very carefully stated by District Judge Waddill. He says:

> "The complainant, and those under whom he claims, have for a period of more than twenty years, been engaged in planting and raising oysters in the waters of the Rappahannock River, upon certain small lots of land formerly leased and set aside to them by the State, paying for said land a yearly rental of

$1.00 per acre. The land was regularly surveyed, plotted, and staked off by the State's representatives, and from that time until the beginning of this controversy, some two years ago, the rent was regularly paid each year, and the work of planting and propagating oysters thereon and catching, marketing, and disposing of the same was openly carried on, under the eyes and with the full knowledge of the State's oyster inspectors and others properly having the right of supervision and direction of what was being done.

"The controversy over the right to occupy all lands claimed by the complainant, came about in this way. After he had held and uninterruptedly occupied the same, paying regularly his rentals therefor for many years to the State, a proceeding was inaugurated by ten citizens before the defendant board of fisheries pursuant to provisions of section 39 of the State's general oyster law, approved March 17, 1910, asking a resurvey of the lands of the public oyster grounds within the territory occupied by the complainant, with the result that the board, without perhaps giving either the formal notice to those to be affected, or according them such a full and formal hearing as the law contemplated, found that portions of the ground within complainant's boundary, as staked off, was a part of the natural oyster rock or bed, hence not subject to be leased to or used by the complainant. Upon the board's action being announced, the complainant, pursuant to another provision of the State oyster law, section 15, asked to be allowed a reasonable time within which to remove from the disputed territory his oysters and oyster shells planted thereon, which request the board denied" (Record, p. 57).

The gravamen of this suit is the want of due process, and involves the reasonableness of the notice required under the

State statute. Under section 39 of the oyster law (Record, p. 57) the Commission of Fisheries is authorized and empowered to select and appoint a surveyor to reestablish and permanently mark any line or lines of the Baylor survey which in the judgment of the said board it may be necessary to define, or an application may be made to the Commission of Fisheries by ten citizens of the county to have same reestablished; "but this cannot be done until ten days' notice of such survey shall be given to all parties whose legal oyster tenures might be directly affected thereby."

The above language of the statute clearly shows that in the contemplation of the Legislature there may be individual rights of citizens upon the public bottoms of the oyster grounds lying within the Baylor survey, and the case at bar is based upon the fact that there are certain oysters planted by appellant supposed and even admitted to be upon said public bottom, valued by appellant at $15,000.00, and that to that extent he is included among the "parties whose legal oyster tenures might be directly affected thereby." Under the statute law of Virginia, the oyster bottoms in the public waters are divided into two classes. One class is known as the "public oyster rocks" and is designated by and included in what is called the "Baylor survey." The lines designated by the Baylor survey separate the public oyster rocks or bottoms from the rest and residue of the river bottoms, and the last-named are known as "oyster planting grounds," which are subject to be leased by the State to private planters at an annual rental of one dollar per acre.

The said Baylor line is not designated by stakes or other marks by which the same can be ascertained by the public, and it is claimed that Mr. Ruediger, the surveyor for the

Commission of Fisheries, is the only person who can accurately designate the same.

The planting grounds, leased by the State of Virginia, are surveyed and designated by oyster inspectors in the several counties bordering on the rivers and are marked by stakes to designate their respective lines. Appellant has been an oyster planter and lessee of the State for a number of years, and a portion of his planting ground adjoins the Baylor line, and it is claimed by the Commission of Fisheries that he is occupying a part of the public bottoms over and beyond the said Baylor line, and that when the Baylor line was reestablished by the surveyor representing the Commission of Fisheries it appeared that appellant was occupying and had oysters planted upon the public bottoms, contrary to the statute.

No court proceedings were had, nor proceedings of any character, to ascertain whether appellant occupied oyster bottoms outside of the Baylor line, nor are there any proceedings provided by statute whereby provision is made for the hearing of such a proceeding in which due and legal notice is given a citizen occupying the public grounds, whereby he may summon witnesses and be afforded a hearing.

The allegations of the bill, the exhibits filed, the affidavits of witnesses, and all the proceedings show that the Commission of Fisheries directed its surveyor to resurvey the oyster-planting grounds occupied by appellant and upon his report decided that appellant was occupying natural oyster beds within said Baylor survey, and then notified him to remove his stakes, to the end that the public might enter upon the said grounds and remove the oysters planted by appellant (Record, pp. 7, 8, and 9).

Assignment of Errors.

Appellant assigns and relies upon the following errors committed by the lower court in entering its decree of February 21, 1920 (Record, pp. 63 and 64), refusing the injunction prayed for:

I.

For the reason that the learned court erred in holding chapter 343, Acts General Assembly of Virginia (1910), page 543, particularly sections 15 and 39, and Acts 1916, chapter 461, page 777, especially section 6, constitutional and not in violation of the rights of this appellant as being in conflict with the 14th Amendment of the Constitution of the United States upon the ground and for the reasons as in the bill of the appellant set forth, and upon the ground that the said court erred in holding that the said statute under which the said defendants assumed to act was constitutional and not void and of no effect, and in not holding that the action of F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., Donald T. Stant, J. Tyler Crittenden, F. K. Sprinkle, and Fred E. Rudeger was null and void and of no effect because the same was had and done without authority of law.

II.

That the court erred by said order and decree in holding that the action of the Commission of Fisheries of Virginia in declaring that the appellant, J. W. Hurley, was occupying

the public rocks in the Rappahannock River in the county of Middlesex, Va., without authority of law, and that on the first day of March, 1919, the stakes designating his oyster grounds should be removed by order of said board and the oysters of the appellant, owned and planted thereon, turned out to the public to be removed from said oyster grounds by any person so desiring, and that the learned court erred in holding that the said act of said Commission of Fisheries was within the power of said Commission and not in violation of the appellant's rights under the Fourteenth Amendment of the Constitution of the United States, notwithstanding the fact that the appellant had no notice, legal or otherwise, for a hearing before said Commission, and that no notice is provided for under said statute.

III.

That the learned court erred in holding in said order and decree that the said appellant, J. W. Hurley, was not deprived of his property without due process of law because of the finding in said order and decree that the prayer of the appellant in his bill sets forth, to wit, that the Commission of Fisheries of Virginia, assuming to act in ordering that the stakes designating the oyster grounds claimed by the appellant as a lessee from the State of Virginia should be removed was unconstitutional, void and of no effect; that the said learned court erred in denying the appellant relief in equity under which conditions the effect and operation of said Acts of General Assembly is such as to make the decision of the Commission conclusive without a hearing, and therefore unconstitutional in that it deprived the ap-

pellant of his property without due process of law and without compensation and denied him equal protection of the law.

IV.

Under section 6, Acts of General Assembly of Virginia, 1916, page 778, it is provided that the residue of waterfronts * * * and the residue of the beds of bays, rivers, etc., other than natural oyster beds, rocks, and shoals, as defined by law, may be occupied for the purpose of planting or propagating oysters thereon by any resident of the State. The grounds leased by the State of Virginia for the purpose are designated by a county surveyor or such surveyor as may be designated by the Commission of Fisheries, and the grounds are marked at the time of the survey, and at the direction of the surveyor with suitable stakes and are kept so marked. Under section 15, Acts of General Assembly of Virginia, 1910, page 549, the statute provides for a resurvey of the oyster grounds under the direction of the Commission of Fisheries. The question of fact involved in any case of resurvey under said oyster laws, where it is claimed that a renter has occupied grounds known as "public rocks" outside the Baylor survey is (1) whether the renter so occupying said grounds is the lessee from the State, or (2) whether the grounds so occupied are staked off as provided by law, or (3) whether the renter has grounds within his stakes known as "public rocks," and, if so, whether he has oysters actually planted on said forbidden grounds, or (4) whether said holder without his own default and by mistake of any officer of the State has had assigned to him and included in the plat of his assignment any portion of the natural oyster beds,

rocks, or shoals as defined by law after such resurvey as above mentioned, when the Commission of Fisheries may direct the said stakes to be removed and may allow a reasonable time within which said renter may remove his oysters. The statute does not provide for any notice or any hearing whereby before the Commission of Fisheries shall ascertain and determine that the said stakes shall be removed, the holder or occupier of said grounds, with oysters actually planted thereon, shall have a hearing before said Commission of Fisheries or before any other legal body; no notice or process is provided and there is no means provided whereby such occupier or holder may make defense or have a hearing under said action of said Commission. Under the terms and provisions of said statute, the said Commission of Fisheries may confiscate or turn out to the public the oysters and property of an oyster-planter upon a finding or holding that the grounds upon which the same are planted is a "public rock." The bill sets out that the appellant, J. W. Hurley, has planted upon the disputed ground oysters valued at $15,000. The learned court erred in holding that under such circumstances and conditions the appellant, J. W. Hurley, was not deprived of his property without due process of law and without compensation.

V.

That the learned court erred in holding by said order and decree that said Commission of Fisheries had jurisdiction—there being no provision in said statute for a hearing on the merits—to direct a resurvey by Fred E. Rudeger, a surveyor, of the oyster-planting grounds of the appellant to decide upon the report of the said surveyor that the appellant was

occupying unlawfully "public rocks" in said Rappahannock River and had jurisdiction to direct that the stakes designating said grounds of appellant should be removed and the appellant denied the right to remove his oysters planted thereon from said ground, notwithstanding the fact as it appears from the bill of complaint, the affidavits filed, and not denied by defendants, that the appellant, J. W. Hurley, had oysters planted by him upon said grounds and within the confines of his stakes.

The sections of the State statute above referred to are:

> "§15. *Resurveys of Planting Ground.*—When, by any resurvey of oyster-planting grounds or survey made to re-establish the lines of the State survey of natural oyster-beds, rocks or shoals, which shall hereafter be made under the direction of the Commission of Fisheries, it shall appear that any holder, without his own default, and by mistake of any officer of the State, has assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks or shoals as defined by law, and it shall further appear that such holder has oysters or shells planted on said ground, then, before the stakes shall be removed from said ground or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commission of Fisheries, in their discretion (and duly advertised), within which to remove his planted oysters or shells from said ground * * *"
>
> Acts 1910, p. 549.

> "§39. *Surveying and Resurveying Planting Grounds and Marking Lines of Geodetic Survey.*—The Commission of Fisheries is hereby authorized and empowered to select and appoint, on such terms

as may be agreed upon, any surveyor, or surveyors to survey, or resurvey, any oyster-planting grounds, either in his own or any other county, and to re-establish and permanently mark any line or lines of the Baylor geodetic survey, which, in the judgment of the Commission of Fisheries, it may be necessary to define; or an application may be made to the Commission of Fisheries by ten citizens of the county to have any line or lines of the Baylor geodetic survey re-established and permanently marked, provided a bond and security be given to the Commission of Fisheries that the applicants will pay all costs for surveying and marking; and provided, further, that ten days' notice of such survey shall be given to all parties whose legal oyster tenures might be directly affected thereby; and if it should turn out that it was not necessary, in the opinion of the Commission, to have said line or lines re-established, then all costs of the surveying and marking shall be borne by the applicants; but if it appear that the Baylor geodetic survey had been encroached upon, then the costs shall be borne by the Commission of Fisheries and the bond given be void."

Acts 1910, p. 557.

ARGUMENT.

The Law of the Case.

The statute law of Virginia, known as the Oyster Law, contained in chapter 343, Acts 1910, contains only two sections applicable to the case at bar, to wit, section 15 and section 39 (Record, pp. 57 and 58). These two sections provide for the resurveying of planting grounds, and it will be noticed that in neither section, nor in any other portion of

the oyster laws of Virginia, is there any provision made for a trial of the rights of an oyster planter who is lessee of the State and whose oyster beds adjoin the Baylor line.

The case at bar, as set forth in the bill, is based upon the want of due process in the proceedings which have been taken by the Commission of Fisheries.

It is submitted that no hearing is provided for by the statute, and none seems to have been contemplated. Section 15 provides that

> "When, by any resurvey of oyster-planting grounds, or survey made to re-establish the lines of the State, survey of natural oyster beds, rocks or shoals which shall hereafter be made under the direction of the Commission of Fisheries, it shall appear that any holder, without his own default, and by mistake of any officer of the State, has had assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks or shoals as defined by law and it shall further appear that such holder has oysters or shells planted on the said ground, then, before the stakes shall be removed from the said ground, or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commission of Fisheries, in their discretion and duly advertised within which to remove his planted oysters or shells from the said ground."

It will be observed that while the statute provides for the ascertainment of a fact and uses the term "if it shall appear, etc.," there is no provision for a hearing and no provision for a notice to the occupant of such grounds or to the owner of such planted oysters.

It is therefore submitted that under the Constitution the Commission of Fisheries did not have jurisdiction to hear and determine the property rights of appellant, without some provision of law whereby he was to be given a hearing, and without notice of the same being provided for in the statute. As set out in the statement of facts and in the pleadings in the cause, appellant had built up and improved the oyster-planting grounds by actually planting oysters thereon; whether by his own negligence in not having all the necessary plats of his ground and all assignments to him duly recorded, yet he had been allowed by the State's officers to stake up these grounds, pay taxes for rental thereof, was thereby an actual lessee of the State, and did have oysters actually planted thereon by authority thus conferred and by permission of the oyster inspectors, and had at the time of the proceedings instituted by the Commission of Fisheries property in the shape of planted oysters upon the said grounds, held and decided by the Commission of Fisheries to be public bottoms within the Baylor survey, of the value of more than $8,000.00.

By the action of the Commission of Fisheries, it has been determined that the stakes designating the oyster grounds of appellant shall be at once removed and that his property, to wit, said planted oysters, shall be thrown open to the public, and that he, the owner thereof, shall not be permitted to take posession of or to remove the same, thus confiscating, without any legal proceedings, the property of appellant.

Adequate notice and a hearing is absolutely necessary in order to provide due process of law. The legislative power cannot, directly or indirectly, reach the property or vested rights of the citizen without a trial and judgment by a court

of competent jurisdiction. Where no hearing is provided for, no summons or notice to appellant before the Commission has found what it is to find and declare what it is to declare, and no opportunity provided for appellant to introduce witnesses before the Commission, there is not the semblance of due process of law. Chicago, M. & St. P. Rwy. Co. *vs.* State of Minn., 134 U. S., 418.

The fundamental requisites of due process are, first, adequate notice; second, a hearing; third, the application of equal law; fourth, jurisdiction. In all cases, reasonableness of the notice required under a State statute involves the vital element of due process. Under section 39 of the oyster law, the Commission of Fisheries is authorized and empowered to select and appoint a surveyor to re-establish and permanently mark, etc., and contains this provision: "* * * *And provided further*, That ten days' notice of such survey shall be given to all parties whose legal oyster tenures might be directly affected thereby * * *." Since appellant is a lessee of the State, he comes within the purview and meaning of the language: "whose legal oyster tenures might be directly affected thereby," but the statute does not provide by whom the notice shall be given, nor does it provide for any action to be taken before any legal tribunal, whereby such persons so affected might be afforded a hearing. It is claimed that no such notice was ever given, but even had it been given the law relative to due process would not have been thereby affected.

It is further submitted that, under the terms of the oyster law, no provision is made for a hearing before said board upon the coming in of the report of a surveyor so appointed to make such resurvey, nor is there any provision for the

summoning of witnesses, nor is there any provision for a hearing before any competent court. This failure of the statute so to provide is a denial of due process of law as provided by the Constitution of the United States, is a taking of private property without such due process of law, and is therefore unconstitutional.

Until appellant received notice from the Commission of Fisheries stating that they had considered his property rights and decided that he had none in said planted oysters, no legal steps had been taken in the premises. In the language of Mr. Justice Pitney, in the case of Ochoa *vs.* Hernandez, 230 U. S., 139, 161, "without the guarantee of due process, the right of private property cannot be said to exist in the sense in which it is known to our laws. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

The many definitions of "due process of law" contain the distinct rule that the court, by whatever name it may be called, must hear before it condemns, which proceeds upon inquiry, and renders judgment only after trial.

Mr. Justice Bradley, in Davidson *vs.* New Orleans, 96 U. S., 97, 107, says: "In judging what is due process of law, respect must be had to the cause and object of taking * * * but if found to be arbitrary, oppressive, and unjust it may be declared to be not due process of law." No judgment of a court is due process of law if rendered without jurisdiction or without notice to the party.

It is contended by appellees that appellant appeared before

the board, to wit, the Commission of Fisheries, had his witnesses examined, and thereby was given a hearing. Appellant had the right, and did not thereby waive any of his privileges, to come into this court by appearing before said board and asking that he might have the privilege and be given a reasonable time within which to remove his oysters, and such action neither aids appellees nor estops appellant. "It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice and give them the right to a hearing, and an opportunity to be heard. * * * The constitutional validity is to be tested, not by what was done under writ, but by what may by its authority be done."

Stuart *vs.* Palmer, 74 N. Y., 183.

Taylor on Due Process, section 133.

Coe *vs.* Armour Fertilizer Works, 237 U. S., 413, 424.

> "This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace."
>
> Central of Georgia R. R., 207 U. S., 127.

Therefore it is submitted that when we are met by the defense on the part of appellees that a hearing has been afforded, if such was a fact, such hearing was afforded as a matter of grace, and this is not sufficient.

Mr. Justice Pitney says, in the case of Ochoa *vs.* Hernandes, 230 U. S., 139: "Without the guaranty of due process, the right of private property cannot be said to exist in the sense in which it is known to our laws. The principle known to the common law, before Magna Charta, was embodied in that charter, and has been recognized since the

revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing" (Record, foot p. 61). See also Taylor on Due Process of Law, section 245. The many definitions of "due process of law" contain the distinct rule that the court, by whatever name it may be called, must hear before it condemns, which proceeds upon inquiry, and renders judgment only after trial.

There is a distinction drawn where the taking is by the sovereignty of the State, through the power of taxation or eminent domain, where the process does not require the same kind of tribunal, but, even in all such cases, provision is made for a hearing by the parties to be affected.

Mr. Justice Bradley, in Davidson *vs.* New Orleans, 96 U. S., 97, says: "In judging what is due process of law, respect must be had to the cause and object of taking * * * but if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law."

No judgment of a court is due process of law if rendered without jurisdiction or without notice to the parties.

Text-writers link together "notice and hearing" as one phrase for the reason, no doubt, that the two distinct rights are so interlaced that it is practically impossible to consider the one without reference to the other.

> "To one who protests against the taking of his property 'without due process of law,' it is no answer to say that, in his particular case, due process of law would have led to the same result, because he had no adequate defense upon the merits."
>
> Coe *vs.* Armour Fert. Works, 237 U. S., 413.

"This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace."

Central Geo. R. R. *vs.* Wright, 207 U. S., 127.
Taylor on Due Process of Law, p. 296.

The facts here show that appellant has been a lessee of the State for a number of years, of oyster ground in the Rappahannock River, and has annually paid to the State rent for the same, and has actually planted oysters upon said grounds. (Record p. 27.) It is claimed by the Board of Fisheries that appellant has taken possession of, and has staked in, a portion of the public bottoms lying within the Baylor survey and adjoining what the said board admits to be planting ground occupied by him.

The Board of Fisheries has forbidden appellant to remove any of said oysters from the said grounds, lying within the Baylor survey, and intends to open said grounds to the public, thereby taking from appellant his property, to-wit: the said planted oysters. The injunction in this case was granted to restrain the said board in their said action.

The courts have authority to enjoin the officers of the State, where they are acting under the color of an unconstitutional statute whereby they commit acts of wrong and injury to the rights and property of appellants, acquired under contract with the State. These suits may be brought in a proper case where the remedy at law is inadequate for an injunction to prevent such wrong and injury. Where suits of this character are brought in the United States Court, they are not within the meaning of the Eleventh amendment, an action against the State.

Regan *vs.* Farmers Loan & Trust Co., 154 U. S., 389.
Fitz *vs.* McGee, 172 U. S., 516.

In the case of Stuart, Governor *vs.* Smith-Courtney Co., 123 Va., 231, the court says: "It is agreed that the board (State Lime Grinding Board) was created by the State for governmental purposes, and that, therefore, this proceeding is in effect a suit against the State, which cannot be maintained without the consent of the State." So in the instant case the Commission of Fisheries is a board created by the State for governmental purposes. Now, for the purposes of this case, it is submitted on the strength of the foregoing authorities, that the statute law of Virginia, authorizing the Commission of Fisheries to proceed as hereinbefore stated, and thereby deprive appellant of his property without due process of law, is unconstitutional, and that the acts and orders of the said Commission of Fisheries are void.

Furthermore, appellant has the right to attack this law on the ground that it is unconstitutional, because he has a pecuniary interest in the question, in that the enforcement of the law would be an infringement upon his rights.

6 R. C. L., section 87.

Boggs *vs.* Commonwealth, 76 Va., 989.

In *Ex parte* Young, 209 U. S., pages 123, 156, it is said:

> "Individuals who as officers of the State are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence an action, either civil or criminal, to enforce an unconstitutional State statute, may be enjoined from so doing by a Federal court. It is not necessary that the duties of a State officer to enforce a statute be declared in that statute itself in order to permit his being enjoined as a party defendant from enforcing it; if by virtue of his office he has some con-

> nection with the enforcement of the act, whether it arise by common, general law, or by statute."

No more flagrant violation of the Constitution of the United States, whose powers are now invoked, could be conceived of than that set forth above in the instant case. 14th Amendment, section 1 (Record, p. 11).

The language of the letter from the Commission of Fisheries of Virginia, dated December 20, 1918, written to Col. T. J. Downing, clearly shows that such was the understanding of the law, when they state in said letter:

> "The Commission decided they had no authority under the law to give Mr. Hurley time in this case, since the testimony of the engineer precluded in the minds of the Commission, the reconciling of the plats recorded in the clerk's office of Middlesex, showing the original assignments, with the ground now held by Hurley" (Record, p. 6).

From this letter it appears that the Commission of Fisheries has arbitrarily, without notice or hearing, in fact, and without same being provided by statute, examined into and investigated the question as to whether the ground now occupied by appellant as oyster-planting ground is the same ground as that described in the original assignments held by him, and they have also decided to "open the ground to the public" and have even refused to give any time for appellant to remove his oysters planted by him as aforesaid from the said grounds.

Judge Waddill, who wrote the dissenting opinion, says:

> "Considering the question of the constitutionality of the two provisions of the State oyster law, section

15 and section 39 above quoted, assailed by the complainant, the writer can but believe that the same are invalid, if what has been done in this proceeding, can be successfully accomplished, in that they do not afford due process of law to those who may be deprived of their property thereunder. Due process of law contemplates always adequate notice, a fair hearing, at which shall be accorded and enforced the equal protection of the laws, and that jurisdiction shall have been reposed in the tribunal administering the laws. It is not enough that the parties whose rights are affected by chance may have had notice, or that the same may have been accorded as a matter of favor. The law itself must require notice, give the right to be heard, and afford an opportunity to that end, and the test of the constitutionality and validity is not what was done, but rather, what may have been done under the statute assailed. (Boggs *vs.* Commonwealth, 76 Va., 989, 998, 999, and 1000, an opinion by Judge Staples, and cases cited; The Central Georgia Railroad, 207 U. S., 127; Chicago, &c., *vs.* State of Minnesota, 134 U. S., 418; Coe *vs.* Armour Fertilizer Co., 237 U. S., 413. The reasonableness of the notice required, the extent to which opportunity is afforded for a hearing, including opportunity for judicial review in proper cases, are vital elements to be taken into account, in construing the validity of the statute. Under section 39 of the oyster law, under review, it is evident that the Commission of Fisheries acts *ex parte*, and without consulting or affording to anyone opportunity to be heard in determining whether they will order a survey or revision of the oyster grounds, and the establishment of lines in connection therewith, and they likewise act in making choice of the surveyor or surveyors, to survey and establish such lines" (Record, pp. 60-61).

CONCLUSION.

The Commission of Fisheries, having determined and ordered that the stakes designating the oyster grounds of appellant be removed, and that the planted oysters and shells, the property of appellant should be thrown open to the public, are seeking to confiscate and take from appellant as a forfeiture, his property, and unless the said Commission of Fisheries, the members of the said board composing the Commission, and all others acting under their authority are restrained by the injunction prayed for in the bill of complaint in this suit, the property of appellant will be thus taken to his great injury and damage.

Upon the facts set forth in appellant's bill, the exhibits filed therewith, and the affidavits of witnesses, it is respectfully submitted that the lower court should have held:

First. That the Commission of Fisheries had no jurisdiction to decide and determine that appellant was not in the legal possession of oyster planting ground, and was not entitled to remove his property thereon, to-wit: his planted oysters and shells.

Second. That, the Constitution of the United States requiring in effect, that there should be a hearing after due notice to appellant by a court of competent jurisdiction, without which there is no due process of law, therefore appellees have violated this principle by seeking to destroy the property rights of appellant.

Third. That the oyster law, failing to provide for legal notice and a hearing, whereby the rights of appellant might have been ascertained appellees have proceeded without due process of law, and should therefore be enjoined.

It is respectfully submitted that the facts set forth in the majority opinion (Record, pp. 52-56), as the basis of the court's conclusion are not a full, fair and correct statement thereof.

Appellant earnestly insists that he is entitled to the injunction prayed for and that if it is not granted so that his rights may be established, after a hearing as provided for by law, he will suffer great pecuniary loss and injury for which he will have no remedy whatsoever.

Respectfully submitted,

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